Supreme Court U.S.
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No. 02-425

IN THE

Supreme Court of the United States

MICHAEL B. KING,

Appellant,

v.

STATE OF GEORGIA, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

MOTION OF APPELLEE STATE OF GEORGIA TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the District Court abused its discretion in denying Appellant's repeated, flawed, and untimely attempts to intervene in a case granted expedited consideration under Section 5 of the Voting Rights Act?

PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

The State of Georgia, Plaintiff

John Ashcroft, in his official capacity as Attorney General of the United States, Defendant

Ralph F. Boyd, Jr., in his official capacity as Assistant Attorney General of the United States, Defendant

The United States of America, Defendant

Roielle Tyra, Defendant-Intervenor

Patrick Jones, Defendant-Intervenor

Georgia Benton, Defendant-Intervenor

Della Steele, Defendant-Intervenor

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OPINIONS BELOW

The December 21, 2001 order of the three-judge district court denying Appellant's motion for leave to intervene without prejudice is unreported but reproduced at J.S. 1C-3C, No. 02-125.[1] The January 30, 2002 order of the three-judge district court denying Appellant's renewed motion for leave to intervene without prejudice is unreported but reproduced at J.S. 1B-3B, No. 02-125. The April 5, 2002 order of the three-

[1] Some of the relevant orders are contained in the Jurisdictional Statement filed by Appellant in his first appeal to this Court from certain orders of the three-judge district court denying his intervention, *Michael B. King v. State of Georgia*, No. 02-125, also currently pending in this Court.

judge district court denying Appellant's motion for reconsideration and, alternatively, second renewed motion for leave to intervene is reported at 195 F. Supp. 2d 25, 33-36 (D.D.C. 2002). The July 2, 2002 order of the three-judge court denying Appellant's third renewed motion for leave to intervene is unreported but reproduced at J.S. 1C-3C, No. 02-425.

JURISDICTION

The three-judge district court entered an order denying Appellant's renewed motion for leave to intervene on January 30, 2002. (J.S. 1C-3C, No. 02-125.) Appellant filed a notice of appeal from that order on February 7, 2002. (J.S. 1D-3D, No. 02-125.) The three-judge district court entered an order denying Appellant's motion for reconsideration and, alternatively, second renewed motion for leave to intervene on April 5, 2002. *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 33-36 (D.D.C. 2002). Appellant filed a second notice of appeal from that order on April 17, 2002. (J.S. 1E-4E, No. 02-125.) The three-judge district court entered an order denying Appellant's third renewed motion for leave to intervene on July 2, 2002. (J.S. 1C-3C, No. 02-425.) Appellant filed a third notice of appeal from that order on July 5, 2002. (J.S. 1B-2B, No. 02-425.)

This Court has jurisdiction to consider an appeal of the denial of a motion to intervene in a case brought pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

STATEMENT OF THE CASE

On October 10, 2001, Appellee State of Georgia filed a complaint for declaratory judgment seeking a judicial determination that its Congressional, State House, and State Senate redistricting plans did not have the purpose or effect of denying the right to vote on account of race or color, in accordance with the requirements of Section 5 of the Voting

Rights Act of 1965, as amended, 42 U.S.C. § 1973c. *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 29-31 (D.D.C. 2002). A three-judge district court was constituted, which granted Georgia's motion for an expedited proceeding and trial. *Id.* at 31-32.

On December 19, 2001, Appellant Michael King ("King"), an attorney and African American citizen of Clayton County, Georgia, filed *pro se* a motion for leave to intervene in the Section 5 case in order to challenge the drawing of one district in the State Senate plan. *Id.* at 33. At the time of the filing of King's first motion to intervene, the United States had not yet taken a position on whether it would object to any of Georgia's redistricting plans and, if so, which plans would be objected to. *Id.* at 32. Consequently, on December 21, 2001, the three-judge district court denied King's motion for leave to intervene without prejudice, "subject to reconsideration at such time as the United States has identified its legal position regarding plaintiff's complaint." (J.S. 2C, No. 02-125.) Additionally, the district court granted King permission to file an *amicus curiae* brief no later than January 14, 2002. (*Id.*) King never did so. *Georgia v. Ashcroft*, 195 F. Supp. 2d at 34, n.6.

On December 31, 2001, the United States indicated that it would oppose only three districts in Georgia's State Senate redistricting plan. *Id.* at 32. King did not file any renewed motion to intervene at that time or at any time permitted by the district court for him to file an *amicus curiae* brief. Instead, on January 15, 2002, King filed a renewed motion for leave to intervene, which came after most of the parties' major filings required by the district court and the setting of the case for trial. *Id.* at 34. As was consistent throughout King's filings, he failed to serve all counsel of record with a copy of his renewed motion, and the district court itself provided opposing counsel with copies. *Id.* Nevertheless, given the expedited nature of the proceedings and the

upcoming trial on February 1, 2002, the district court ordered that responses to King's renewed motion be filed by January 17, 2002, with replies filed by January 18, 2002. *Id.* Georgia objected to the intervention, and King filed no reply. *Id.* at 34-35.

The district court also entered an order scheduling a pretrial conference for January 25, 2002, and faxed King a copy of this order. *Id.* at 35. King did not appear at the pretrial conference, nor did he communicate in any way with the district court concerning the expedited schedule for this matter. *Id.* On January 30, 2002, the district court denied King's renewed motion to intervene without prejudice "due to his failure to appear at the January 25, 2002 pretrial conference, of which he had notice, his consistent failure to communicate with chambers and with counsel for the parties in this matter, and the expedited nature of these proceedings . . . . " (J.S. 2B, No. 02-125.)[2] On February 7, 2002, King filed a notice of appeal from the district court's January 30, 2002 order. (J.S. 1D-3D, No. 02-125).

The trial of this matter was conducted on February 4-7, 2002.[3] On February 7, 2002, the last day of the trial, King filed (again without serving counsel of record) a "motion for reconsideration and alternatively second renewed motion to intervene" and a "motion to stay hearing." *Georgia v.*

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[2] The district court, in discussing King's subsequent faulty attempt to intervene, reiterated its rationale for the denial of the renewed motion to intervene: "King 'failed to protect [his] interest in a timely fashion' by repeatedly failing to communicate with the court, to keep apprised of the case and to comply with local filing requirements. King knew or should have known the proceedings were subject to expedited review." *Georgia v. Ashcroft*, 195 F. Supp. 2d at 35 (quoting *NAACP v. New York*, 413 U.S. at 367).

[3] The start of the trial was delayed three days at the parties' request to enable them to complete discovery. *See Georgia v. Ashcroft*, 195 F. Supp. 2d at 35.

Ashcroft, 195 F. Supp. 2d at 35. On April 5, 2002, the three-judge district court issued its decision on Georgia's Section 5 action, granting preclearance of the state's Congressional and State House plans, but denying a declaratory judgment on the State Senate plan. *Id.* at 97. As a part of that order, the three-judge district court denied King's motion for reconsideration and motion to stay hearing as untimely and also because King's filing of his notice of appeal from the court's January 30, 2002 order divested it of jurisdiction over the issue of intervention. *Id.* at 35-36. King filed his second notice of appeal, this time from the district court's April 5, 2002 order denying intervention, on April 17, 2002. (J.S. 1E-2E, No. 02-125.)[4]

Following the three-judge district court's April 5, 2002 order, the State of Georgia requested, and the district court agreed, to retain jurisdiction to consider Georgia's enactment of a corrective State Senate redistricting plan under Section 5. *Georgia v. Ashcroft*, 204 F. Supp. 2d 4, 5 (D.D.C. 2002). By order dated June 3, 2002, the three-judge district court granted Section 5 approval to the revised State Senate redistricting plan and entered its final judgment. *Id.* at 16. On June 6, 2002, Georgia filed a notice of appeal of the final judgment of the district court, seeking this Court's review of the earlier decision denying Section 5 approval on the original State Senate redistricting plan. *See id., appeal docketed*, No. 02-182 (U.S. Aug. 6, 2002). On June 25, 2002, three weeks after this final order, King filed yet a third renewed motion for leave to intervene, again failing to serve any counsel of record. (J.S. 1C-3C, No. 02-425.) In an order filed July 2, 2002, the district court denied the third motion to intervene as untimely and because jurisdiction had been divested due to Georgia's appeal of the district court's final

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[4] King filed a jurisdictional statement relating to his first and second notices of appeal (No. 02-125) on June 17, 2002.

judgment. (*Id.*) On or about July 5, 2002, King filed his "Third Notice of Appeal" from the Court's final judgment rendered on June 3, 2002 and, "alternatively," from the district court's order denying his third motion to intervene. (J.S. 1B-2B, No. 02-425.)

King's jurisdictional statement filed with the Court in No. 02-425 contains no argument amplifying the reasons why this Court should grant his appeal, contrary to this Court's rules. *See* Sup. Ct. R. 14.1(h) & 18.3. On September 25, 2002, Georgia filed a waiver of its right to file a motion to dismiss or affirm in response to this jurisdictional statement. By letter dated November 12, 2002, the Clerk sent notice of this Court's direction to the State of Georgia to file a formal response to King's jurisdictional statement in No. 02-425.

ARGUMENT

Appellee State of Georgia respectfully suggests that this Court should dismiss King's appeal or affirm the decisions of the three-judge district court denying his motion to intervene for one or more of the following reasons:

1. *The motions were untimely.* Intervention in a federal court proceeding, even when that proceeding is brought under the Voting Rights Act, is governed by Rule 24 of the Federal Rules of Civil Procedure.

> Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

NAACP v. New York, 413 U.S. 345, 365-66 (1973).

King filed his first motion to intervene a mere six weeks before trial, after the district court granted Georgia's request to expedite proceedings under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. King filed his second renewed motion to intervene on the final day of trial, and his third renewed motion to intervene three weeks after final judgment was entered. Clearly, King's repeated attempts to intervene in this action were untimely, based upon the totality of the circumstances, and the district court did not abuse its discretion in denying the motions on that ground.

2. *King continually violated district court orders.* Although King was proceeding *pro se*, he is a licensed attorney whose continual refusal to abide by court procedures and orders provided enough reason for the district court to decline to grant him intervention. King failed to serve opposing counsel with copies of his motions, failed to comply with court administrative procedures, failed to file an *amicus curiae* brief or renew his motion to intervene within the time permitted by the court, failed to attend a pretrial conference upon the court's direction, and waited until after significant events occurred in the litigation before "renewing" his untimely motions. *Georgia v. Ashcroft*, 195 F. Supp. 2d at 32-36. It was within the district court's discretion to deny King's motions for his continuous violations of orders and procedures.

3. *The filing of King's notices of appeal on February 7, 2002, and April 17, 2002, divested the district court of jurisdiction to consider any subsequent motions to intervene.* This Court has emphasized that "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); *accord Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985).

Once a notice of appeal is timely filed, the district court may not take any action that would "alter the status of the case as it rests before the [appellate court]." *Dayton Indep. Sch. Dist. v. United States Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990) (quoting *Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817, 820-21 (5th Cir. 1989)). This includes granting a motion to intervene. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 928-29 (5th Cir. 1983) (providing collection of cases holding that filing a notice of appeal divests district court of jurisdiction to rule on motion to intervene); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 327 (7th Cir. 1980) (concluding that district court properly denied motion to intervene because simultaneous notice of appeal divested court of jurisdiction to grant motion). It also includes reexamining an order or judgment from which an appeal is pending. *See Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir. 1978) ("[T]he District Court is without jurisdiction to alter a judgment of its own while an appeal therefrom is ongoing."). Consequently, when King filed his first and second notices of appeal, it divested the district court of jurisdiction to consider any other disposition of King's attempts at intervention.

4. *King failed to satisfy any requirements for intervention under Fed. R. Civ. P. 24.* Section 5 of the Voting Rights Act contains no express provision permitting intervention, as it contemplates that the Attorney General of the United States will protect the public interest in defending actions brought pursuant to Section 5. *See Apache County v. United States*, 256 F. Supp. 903, 906 (D.D.C. 1996) (three-judge court) ("The Voting Rights Act makes no express provision for intervention. It rather contemplates that the Attorney General will protect the public interest . . . ."). Consequently, King could not intervene under Fed. R. Civ. P. 24(a)(1) or 24(b)(1).

Even assuming intervention in a Section 5 case would be possible under Fed. R. Civ. P. 24(a)(2) or 24(b)(2), King

completely failed to satisfy any of the prerequisites for intervention under those rules. In order to intervene as of right in accordance with Rule 24(a)(2), King would have had to satisfy all four of the following prerequisites: (1) the motion must be timely; (2) the movant must have an interest relating to the subject matter of the action; (3) the movant's interest must be impaired or impeded as a practical matter if intervention is denied; and (4) the movant's interest must not already be represented adequately by existing parties. *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994).

First, as stated above, none of King's motions to intervene were timely filed. Given King's tardiness in filing his renewed motions to intervene, the granting of his intervention after the conclusion of the trial would have done more than cause delay in the proceedings, it would have effectively nullified the actions of all parties and the district court that already were completed. Second, King failed to show any legal interest in the Section 5 proceedings, since his own motion to intervene alleged violations of only Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, which issue was not before the district court in this Section 5 preclearance action. Third, King's interest was not impaired by the outcome of the Section 5 case. King can still litigate his claims by pursuing his own Section 2 complaint.[5] Finally, the Attorney General of the United States adequately represented the interests of registered voters such as King in the Section 5 action. *See Donnell v. United States*, 682 F.2d 240, 247 (D.C. Cir. 1982) ("Congress assigned to the

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[5] In fact, King has already done so by filing an action in the United States District Court for the Northern District of Georgia, where he is currently appealing in this Court a denial of a preliminary injunction. *See Michael B. King v. State of Georgia*, No. 02-776 (jurisdictional statement filed Nov. 21, 2002).

Attorney General the primary role in vindicating the public interest under the [Voting Rights] Act.").

In order for a court to consider granting permissive intervention under Rule 24(b)(2), a movant must demonstrate "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the action." *EEOC v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Moreover, "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(2).

King's repeated efforts at intervention failed to meet any of these factors. King, in raising Section 2 issues, could not demonstrate an independent ground for jurisdiction in a Section 5 proceeding. King's claim had little in common with a Section 5 preclearance proceeding. Most importantly, the district court repeatedly found that King's motions were untimely and would have delayed the proceedings. Even if all requirements of Rule 24(b)(2) were met, the district court could still in its discretion deny permissive intervention. *Nat'l Children's Center*, 146 F.3d at 1048. King has failed to show why the district court erred by failing to exercise its discretion to grant permissive intervention.

5. *King fails to include any legal argument in support of* his *jurisdictional statement.* Rule 18.3 of this Court provides that "the jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14, and shall be served as required by Rule 29." Sup. Ct. R. 18.3. Rule 14.1(h) requires "a direct and concise argument amplifying the reasons relied upon for allowance of the writ." Sup Ct. R. 14.1(h). In his jurisdictional statement, King merely enumerates his version of the facts, and includes not one legal argument supporting reversal of the district court's orders.

CONCLUSION

Accordingly, for the above reasons, Appellee State of Georgia respectfully urges this Court to dismiss the appeal or, in the alternative, to affirm the decision of the district court denying Appellant's motions to intervene.

Respectfully submitted,

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